No. 77.

Brief of Atty. Gen.l (Pratt) for Appt

Filed Oct. 19, 1897.

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JAMES H. McKENNEY,

In the Supreme Court of the United States

OCTOBER TERM, 1897.

THE UNITED STATES, APPELLANT,
v.
FRANK B. CROSTHWAITE, APPELLEE. } No. 77.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF OF APPELLANT.

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STATEMENT OF CASE.

This is an appeal by the United States from a judgment rendered against them by the Court of Claims.

The facts as found by that court are briefly as follows:

During the year 1892 appellee was an examiner in the Department of Justice, at a salary of $2,500 per annum, and had been sent to the State of Idaho to perform certain duties, more fully set out in Finding I. While thus engaged, to wit, on August 9, 1892, he was ordered to

report to and assist the United States attorney at a special term of the United States court, at Cœur d'Alene City, Idaho. On August 13, 1892, appellee was appointed a special assistant to the United States attorney for the district of Idaho, one of the clauses of his commission reading as follows:

> Your compensation will be determined by the Attorney-General upon the completion of your service.

On August 14, 1892, but prior to his receipt of this commission, appellee mailed to the Attorney-General an official letter in relation to the criminal proceedings then being instituted in Idaho against rioters and conspirators, in which he said:

> I will proceed to Wallace to-morrow for the purpose of preparing the cases for trial and to select the necessary witnesses, in order that none may be subpœnaed unnecessarily. The marshal has been instructed to provide a sufficient guard for the term to be held, and everything appears to be moving along smoothly. In order that no question may be raised by the defense as to my status and that I may be able to appear before the grand jury, I beg to suggest the advisability of my appointment as a special assistant to the United States attorney, without compensation, for these cases.

Appellee took the oath of office as special assistant to the district attorney, appeared in these riot cases before a United States commissioner, examined witnesses before the grand jury, and rendered daily attendance and assistance at their trial, and generally performed the duties of an assistant district attorney from August 22, 1892, to

September 28, 1892. He also, during said period, performed his duties as an examiner, for which he was paid and allowed traveling expenses. On September 29, 1892, appellee filed with the Attorney-General an application for compensation for the above services as special assistant district attorney, which was disallowed by the Attorney-General upon the ground that they were services that fell within the duties of an examiner.

ASSIGNMENT OF ERRORS.

I.

The court erred in finding that said appellee, Frank B. Crosthwaite, rendered the professional assistance of an assistant district attorney to the United States attorney for the district of Idaho from the 23d August, 1892, to the 28th September, 1892, and also performed his duties as an examiner of the Department of Justice at the same time, as set out in Finding IV.

II.

The court erred in finding that the value of appellee's services as special assistant district attorney for said period was $300, as set out in Finding V.

III.

The court erred in finding, as a conclusion of law, that said appellee should recover the value of his services as assistant district attorney, to wit, $300.

IV.

The court erred in rendering judgment in favor of said appellee and against these appellants for said sum.

ARGUMENT.

From the above statement of facts it seems clear to us that practically all of the services performed by appellee as a special assistant district attorney could have been performed by him as an examiner, and that it was his duty as an examiner to perform them when so ordered by the Attorney-General. If this is true, it is clear that he can not receive compensation for performing them both as an examiner and as a special assistant district attorney.

Section 1763, Revised Statutes, is as follows:

> No person who holds an office the salary or annual compensation to which amounts to the sum of two thousand five hundred dollars shall receive compensation for discharging the duties of any other office, unless expressly authorized by law.

This court and the Supreme Court have held in several cases, among others *Saunders's Case* (120 U. S., 126), that this section is not applicable to persons holding two offices whose duties are different and distinct and not incompatible.

In taking advantage of these decisions claimant has pursued the usual course of claimants and pointed out that the duties of the two offices are not incompatible, and ignored the further requirement that those duties must be *distinct and different*. And yet no decision of this court or the Supreme Court has been silent as to this condition.

In *Converse's Case* (21 How., 463) the Supreme Court held, in discussing this and similar statutes, that the Secretary of the Treasury could appoint a collector of customs

an agent to purchase supplies for light-houses, and could allow him commissions upon his disbursements for supplies for light-houses outside of his district, but could not allow him anything upon those purchased for use in his district, because the Secretary might have ordered him to make such purchases as collector, in which case he would not have been entitled to any extra compensation if his regular compensation amounted to as much as $2,500 per annum.

In this case it was the duty of the claimant, as an examiner, to assist the district attorney in every manner possible in the trial of these cases, and the only service which he is shown to have performed as a special assistant which he could not have performed as an examiner was going into the grand jury room. It will hardly be contended that this was worth the amount of the judgment in the court below. The other services he was by his own statement (Finding VI) in the act of performing as an examiner when he received his oppointment as a special assistant district attorney, and since he could have continued and completed them in that capacity they certainly were not duties *distinct and different* from those of an examiner.

We therefore insist that while the two offices held by appellee may not have been incompatible, their duties were not distinct and different, and could not be held by one person at the same time.

Another reason why appellee should not recover is that when such special assistant is appointed the Attorney-General must, under the provisions of section 365, Revised

Statutes, certify that the services could not have been performed by the officers of the Department of Justice or the district attorney before such special assistant can be compensated for his services. This certificate the Attorney-General indignantly refused to give (Finding VIII), and without it we insist appellee can not recover.

LOUIS A. PRADT,
Assistant Attorney-General.